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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/652,745

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Charles S. Schasteen

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EXAMINER

KANTAMNENI, SHOBHA

ART UNIT

PAPER NUMBER

1617

NOTIFICATION DATE

DELIVERY MODE

05/14/2008

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

uspatents@senniger.com

<b>Advisory Action</b> <b>Before the Filing of an Appeal Brief</b>	<b>Application No.</b> 10/652,745	<b>Applicant(s)</b> SCHASTEEN ET AL.	
	<b>Examiner</b> Shobha Kantamneni	<b>Art Unit</b> 1617	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 11 April 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 4 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
- (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ They raise the issue of new matter (see NOTE below);
- (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
- The status of the claim(s) is (or will be) as follows:
- Claim(s) allowed: NONE.
- Claim(s) objected to: \_\_\_\_\_.
- Claim(s) rejected: 75,77-104 and 113-133.
- Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See page 2.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_
13. ☐ Other: \_\_\_\_\_.

/SREENI PADMANABHAN/  
Supervisory Patent Examiner, Art Unit 1617

Continuation of 3: Applicant's proposed amendment herein, add new claims 134-136, inserting new limitations into the new claims 134-136, present new issue for search and consideration by the Examiner.  
Therefore, the proposed amendment After Final will not be entered.

Continuation of 11 . All rejections of record in the Final Office Action 12/11/2007 are maintained. Applicant's remarks/arguments filed on 04/11/2008 after FINAL with respect to all rejections made under 35 U.S.C. 112, second paragraph, and under 35 U.S.C. 103(a) have been fully considered but are unpersuasive in view of not entered proposed amendment, and as discussed in the Final Rejection, and those found below.

Rejection of Claims 75, 77-80, 82-87, 90-93, 96-98, 104, 113, 115-119, 133 under 35 U.S.C. 103(a) as being unpatentable over Ivey et al. (US 5,928,686, PTO-892), and as evidenced by Blake et al. (US 2,938,053, PTO-892), in view of Bland et al. (US 5,591,467, PTO-892) is MAINTAINED.

Applicant argues that " '467 patent, when properly viewed in its entirety, teaches away from the use of the listed organic acids or their combinations because they are said to be ineffective at killing bacteria in animal feed." These arguments have been considered, but not found persuasive because '467 teaches clearly that formic acid, propionic acid, lactic acid have bactericidal properties and kill bacteria in solution. As evidenced by Blake et al. 2-hydroxy-4-(methylthio)butanoic acid has antimicrobial activity. Accordingly, it is generally considered prima facie obvious to combine compounds each of which is taught by the prior art to be useful for the same purpose, in order to form a composition which is used for the very same purpose. The idea for combining them flows logically from their having been used individually in the prior art. As shown by recited teachings of Ivey et al. Blake et al., and Bland et al., the instant claims contain agents such as hydroxy-methylthio butanoic acid, propionic acid, formic acid, lactic acid useful as antimicrobial agents. In re Kerkhoven, 626 F.2d 848, 205 USPQ 1069 (CCPA 1980).

Applicant argues that " Not one of the passages of column 1 cited by the Office establishes that 2-hydroxy-4- (methylthio)butanoic acid is effective in killing microbes in feed or water." These arguments have been considered, but not found persuasive. It is pointed out that as the combined teachings of Ivey et al., Blake et al., and Bland et al., renders the claimed composition obvious, the property of such a claimed composition will also be rendered obvious by the prior art teachings, since the properties, namely "killing microbes in food" when mixed with food, are inseparable from its composition. Therefore, if the prior art teaches the composition or renders the composition obvious, then the properties are also taught or rendered obvious by the prior art. In re Spada, 911 F.2d 705, 709, 15 USPQ 1655, 1658 (Fed. Cir. 1990.) See MPEP 2112.01. The burden is shifted to Applicant to show that the prior art product does not possess or render obvious the same properties as the instantly claimed product. Thus, the methods as taught by Ivey et al., Blake et al., and Bland et al., necessarily result in killing microbes in food, as recited in the claims.

Rejection of Claims 88-89 under 35 U.S.C. 103(a) as being unpatentable over Ivey et al. and as evidenced by Blake et al. (US 2,938,053, PTO-892), in view of Bland et al., and further in view of Pinski et al. (US 2002/0172737, PTO-892) is MAINTAINED.

Applicant argues that " Nowhere does the '737 application disclose that any of the above referenced "liquid antimicrobials" are effective at killing microbes in food or water that isn't "encapsulated", as required by claim 88. Moreover, of the rather long list of antimicrobials, only two (i.e., benzoate and propionic) are even recited in claim 88." These arguments have been considered, but not found persuasive. It is pointed out that the instant claims are not limited to unencapsulated antimicrobials. The instant claims broadly recite "composition comprising at least two organic acids." Pinski et al. ('737) teaches that organic acids such as propionic acid, citric acid etc. are employed in aquatic feed to provide shelf life. Accordingly, one of ordinary skill in the art would have been motivated to employ the formulation comprising Alimet, organic acids taught by the combination of references to mix with feed for aquatic animal because Ivey et al. formulations have antimicrobial properties according to Blake et al, and Pinski teaches that the feed composition for feeding aquatic animals comprise antimicrobial agents.

The rejection of Claims 94-95 under 35 U.S.C. 103(a) as being unpatentable over Ivey et al. and as evidenced by Blake et al. (US 2,938,053, PTO-892) in view of Bland et al., and further in view of Friedman et al. (US 4,495,208, PTO-892) is MAINTAINED.

Applicant argues that "'208 patent discloses that the "more preferred acids" are those selected from the group consisting of heptanoic, octanoic, and nonanoic. None of the preferred organic acids are even recited in claim 94." These arguments have been considered, but not found persuasive. It is pointed out that the '208 reference was employed for its teachings that antibacterial agents are employed in pet food, and not for particular organic acids.

Rejection of Claims 75-82, and 96 under 35 U.S.C. 103(a) as being unpatentable over Paquet et al. (CA 1261855, PTO-892), in view of Bland et al. (US 5,591,467, PTO-892) is MAINTAINED.

Applicant argues that "Formula I is not disclosed by Paquet et al. The compounds of Formula I require a sulfur atom at one end of the molecule and a carboxylic acid at the other terminal of the molecule. While Paquet et al. disclose sulfur when Y is methionine, Paquet et al., does not comprise a carboxylic acid at the other end of the molecule irrespective of what moiety is selected for X." These arguments have been considered, but not found persuasive. It is pointed out that Paquet teaches N-acyl methionine as the antimicrobial compound. N-acyl methionine has sulfur atom at one end and carboxylic acid at the other terminal and thus meets instant formula (I).

Applicant's arguments with respect to rejection of Claims 75, 77, 97, 99-103, 113-117, 133 under 35 U.S.C. 103(a) as being unpatentable over Doerr et al. (Poultry Science, 74 (1), 23, 1995, PTO-892), in view of Rolow et al. (US 6,355,289, PTO-892) have been considered, but not found persuasive as discussed above, and those found in the final office action.